BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NETTIE WILSON	)	
Claimant	)	
VS.	)	
	)	Docket No. 245,577
LAWRENCE LANDSCAPE, INC.	)	
Respondent	)	
AND	)	
	)	
ALLIED MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the April 20, 2000 Award entered by Administrative Law Judge Brad E. Avery. The Appeals Board heard oral argument on September 20, 2000.

APPEARANCES

Chris Miller of Lawrence, Kansas, appeared for claimant. John F. Carpinelli of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. The record also includes the April 14, 2000 Post-Injury Wage and Hour Stipulation with attached records.

ISSUES

This is a claim for a November 10, 1997 accident and resulting low back injury. In the April 20, 2000 Award, which is the subject of this appeal, Judge Avery averaged a 50 percent task loss with a 45 percent wage loss and found that claimant had a 47.5 percent permanent partial general disability.

Respondent and its insurance carrier argue that Judge Avery erred. They argue that the Judge should not have given any weight to the task list prepared by claimant and her

attorney as it is inaccurate. They argue that the Judge should have only used Dr. Joseph F. Galate's task loss opinion that was based upon Monty Longacre's task list. Respondent and its insurance carrier contend the Judge erred by failing to find that claimant had a 25 percent task loss and a 43 percent wage loss, which would reduce claimant's permanent partial general disability to 34 percent.

Conversely, claimant argues that she has a 68 percent wage loss and a 60 percent task loss for a 64 percent permanent partial general disability.

The only issue before the Appeals Board on this review is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. On or about November 10, 1997, claimant injured her low back. The injury arose out of and in the course of claimant's employment with respondent.

2. As a result of the work-related injury, in September 1998 claimant underwent back surgery for a herniated disc at the L5-S1 intervertebral level. As the discectomy did not entirely resolve claimant's symptoms, claimant underwent additional treatment from Dr. Joseph F. Galate. In July 1999, Dr. Galate released claimant to return to work with the following restrictions: no lifting greater than 30 pounds, no pushing or pulling greater than 60 pounds, and no frequent bending.

3. Following the release to return to work, claimant attempted to perform her former job as a mowing supervisor but found that she could not physically do the job. Respondent, a landscaping company, was not able to accommodate claimant's restrictions. Therefore, claimant began searching for employment with other employers.

4. In December 1999, Dr. Edward J. Prostic, an orthopedic surgeon, examined claimant at her attorney's request. Dr. Prostic diagnosed claimant as having epidural fibrosis that developed following surgery. The doctor adopted Dr. Galate's restrictions but added that claimant should also avoid frequent twisting at the waist, avoid using vibratory equipment, and avoid captive positioning. Dr. Prostic found claimant's whole body functional impairment rating to be 17 percent as compared to Dr. Galate's 10 percent rating.

5. Claimant's attorney also requested Dr. Robert W. Warner, a chiropractor, to examine and evaluate claimant. Dr. Warner saw claimant on one occasion in September 1999 and diagnosed claimant as having a post-surgical lumbar disc syndrome. The doctor would restrict claimant from lifting over 20 pounds; from repetitive bending, lifting, or twisting; and from any athletic activities that would aggravate the low back such as jogging

or racket-type sports. Dr. Warner rated claimant's whole body functional impairment at 10 percent.

6. Claimant's back injury has adversely affected her ability to work. Claimant and her attorney prepared a list of tasks that claimant had allegedly performed over the 15 years immediately preceding the date of accident. Monty Longacre, a vocational rehabilitation consultant, also prepared such a task list.

Dr. Prostic reviewed claimant's task list and found that claimant was unable to do 9 of the 18 total tasks. Dr. Warner reviewed claimant's list and found that claimant was now unable to do 12 of the 18 tasks. Dr. Galate reviewed claimant's list and initially found that claimant was unable to do 15 of 18 tasks. But Dr. Galate also reviewed Mr. Longacre's list and found that claimant could not do 12 of the 31 total tasks.

7. The Appeals Board finds that claimant should observe those work restrictions and limitations set forth by Dr. Prostic and Dr. Galate. Therefore, Dr. Warner's task loss opinion will not be used for determining claimant's permanent partial general disability.

8. The Appeals Board is not persuaded that one task list is more accurate or deserves greater weight than the other. But the Board does find that claimant failed to prove that the task described as doing laundry for Regency Healthcare would exceed the doctors' lifting restrictions as it appears that a worker performing that task could easily control the amount of weight being handled and, thus, work within a designated lifting restriction. Adjusting the doctors' task loss opinions in light of that fact, the Appeals Board modifies Dr. Prostic's task loss opinion, which utilized claimant's task list, and Dr. Galate's task loss opinion that utilized Mr. Longacre's task list. Considering those modified opinions, the Appeals Board finds that claimant's task loss falls somewhere between 35 percent[1] and 44 percent.[2] For purposes of computing claimant's permanent partial general disability, the Appeals Board concludes that claimant's task loss is 40 percent.

9. Respondent and its insurance carrier argued that the Board should entirely disregard claimant's task list or, in the alternative, find that claimant could actually perform several other tasks described in the lists. In response to those arguments, the Board finds claimant's task list fairly represents her work tasks for the 15-year period before the November 1997 accident.

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[1] This percentage is derived from modifying Dr. Galate's task loss opinion that utilized Mr. Longacre's task list. That task loss opinion is modified from a loss of 12 of 31 tasks to a loss of 11 of 31 tasks, which creates a 35 percent task loss.

[2] This percentage is derived from modifying Dr. Prostic's task loss opinion, which utilized claimant's task list. That opinion is modified from a loss of 9 of 18 tasks to a loss of 8 of 18 tasks, which creates a 44 percent task loss.

Contrary to the respondent and its insurance carrier's contentions, the Board finds that the testimony elicited from claimant on cross-examination did not establish that her task list erroneously described her former work tasks or that claimant retained the ability to perform such tasks. Regarding Mr. Longacre's task #17, which he described as "Clean floors – vacuum and mop," the Appeals Board rejects respondent and its insurance carrier's request to further break the task down into two tasks. Mr. Longacre, who has great experience in analyzing jobs and breaking those jobs down into tasks, found that cleaning floors should be treated as one task and the Appeals Board agrees.

Because claimant currently works part-time for Westminster Inn as a housekeeper and performs some of the same tasks that she did for Integra Hotel/Holidome, respondent and its insurance carrier argued that claimant could do task #21, which Mr. Longacre described as making beds. Because the ability to perform that job appears to be based upon the hours per day that claimant is required to do that type of work, the Appeals Board declines to modify Dr. Galate's task loss opinions regarding that task.

Respondent and its insurance carrier argued that the Board should modify Dr. Galate's opinions regarding task #24, which Mr. Longacre described as packing products. The Appeals Board declines to modify the doctor's opinions regarding that task. Respondent and its insurance carrier argued that they proved on cross-examination that claimant had erroneously described that task. But the Board finds that claimant's cross-examination testimony was equivocal and that it failed to prove that claimant did not lift the weights that she indicated in her task list. Similarly, the Board declines to modify the doctor's opinions regarding Mr. Longacre's task #29, which is described as stacking boxes.

10. When respondent failed to provide claimant with accommodated work, claimant began looking for other employment. On September 28, 1999, claimant began working part-time for Westminster Inn where she now earns $7.75 per hour cleaning rooms. At the time of regular hearing, claimant was not looking for full-time employment or work that would pay a higher average weekly wage. Claimant is not restricted from working full-time and, according to Mr. Longacre, retains the ability to earn between $280 and $400 per week. The Appeals Board finds and concludes that claimant retains the ability to earn $310 per week, which would equate to full-time work at $7.75 per hour.

CONCLUSIONS OF LAW

1. The Award should be modified to find a 70 percent permanent partial general disability until September 28, 1999, and a 42 percent permanent partial general disability after that date.

2. Because claimant has an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1997 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of no work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that workers' post-injury wages should be based upon their ability to earn rather than their actual wages when they failed to make a good faith effort to find appropriate employment after recovering from their injuries.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

3. When respondent failed to accommodate claimant's restrictions and return her back to work, claimant began looking for other employment. But once claimant found the part-time job with Westminster Inn, claimant discontinued her job search. Claimant is not presently looking for full-time employment despite only working a little over 20 hours per week.[6] The Appeals Board finds and concludes that claimant initially made a good faith effort to find appropriate employment and, therefore, her actual wages should be used in

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[5] *Copeland*, p. 320.

[6] The records stipulated into evidence indicate that claimant works approximately 22 hours per week at Westminster Inn.

the permanent partial general disability formula for the period up to September 28, 1999, when she obtained part-time work. But after that date, a post-injury wage should be imputed because claimant discontinued her job search and stopped looking for appropriate full-time work.

Based upon the above conclusions, claimant has a 100 percent wage loss until September 28, 1999. After that date, $310 per week should be imputed as the post-injury wage for determining claimant's wage loss. Comparing $310 to $542.08, which is the pre-injury average weekly wage, creates a 43 percent wage loss for the period commencing September 28, 1999.

4. Averaging the 40 percent task loss with the 100 percent wage loss, the Board finds that claimant has a 70 percent permanent partial general disability until September 28, 1999. After that date, claimant has a 42 percent permanent partial general disability, which is the rounded average of the 40 percent task loss and the 43 percent wage loss.

5. Finding that a chiropractor is not a physician within the meaning of K.S.A. 1997 Supp. 44-510e(a), the Judge determined that Dr. Warner was not qualified to provide a task loss opinion and, therefore, did not consider it. For the reasons set forth below, the Appeals Board disagrees.

K.S.A. 1997 Supp. 44-510e(a), which is the statute and subsection that defines permanent partial general disability, first contains language that restricts all task loss opinions to "physicians." But the statute also states that the permanent partial general disability shall not be less than the functional impairment rating as established by competent medical evidence.

> . . . Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, ***in the opinion of the physician***, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by ***competent medical evidence*** and based on the fourth edition of the American Medical

> Association Guides to the Evaluation of Permanent Impairment . . . (Emphasis added.)

When the parties cannot agree upon the functional impairment rating, K.S.A. 1997 Supp. 44-510e(a) gives the administrative law judge the authority to appoint an independent health care provider for a functional impairment opinion, which the judge is then required to consider.

> . . . If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an ***independent health care provider*** who shall be selected by the administrative law judge from a list of ***health care providers*** maintained by the director. The ***health care provider*** selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination. . . . (Emphasis added.)

The term "health care providers" as used in the above quoted statute is defined by the Workers Compensation Act and specifically includes chiropractors. K.S.A. 1997 Supp. 44-508(i) provides:

> (i) "Health care provider" means any person licensed, by the proper licensing authority of this state, another state or the District of Columbia, to practice medicine and surgery, osteopathy, chiropractic, dentistry, optometry, podiatry or psychology.[7]

Reading K.S.A. 1997 Supp. 44-508(i) and K.S.A. 1997 Supp. 44-510e together, the Act allows chiropractors to provide "competent medical evidence" of an employee's functional impairment rating. Therefore, it would be illogical to conclude that the legislature intended chiropractors were competent to provide functional impairment opinions but incompetent to provide task loss opinions. Likewise, it would be illogical to conclude that the legislature intended chiropractors were competent to determine a worker's physical abilities in assessing impairment but incompetent to determine whether those abilities permitted a worker to perform a specific job task.

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[7] Before 1990 amendments to the Workers Compensation Act, K.S.A. 44-508(i) defined physicians and surgeons to include chiropractors. But the 1990 legislature amended several sections of the Act, changing the term "physician" to "health care provider." At the same time, the legislature amended K.S.A. 44-508(i) and replaced the reference to physicians and surgeons with "health care provider."

Instead, the Appeals Board concludes that the legislature did not intend to use the term "physician" in a technical sense, which in some areas of the law would refer only to those persons who practice medicine or perform surgery.[8] That conclusion is also supported by the legislature's use of the different terms utilized in K.S.A. 1997 Supp. 44-510e(a). The Appeals Board concludes that there would not be any rational explanation to interpret the Workers Compensation Act in such a manner as to permit chiropractors to provide functional impairment opinions but restrict them from testifying as to whether a work task violates a worker's work restrictions and limitations.

For the above reasons, a chiropractor's opinion of task loss is admissible in a workers compensation proceeding and should be given such weight as it may be entitled. In this instance, the Appeals Board concludes that the task loss opinions of Doctors Prostic and Galate are the most accurate and credible. Therefore, Dr. Warner's task loss opinion is considered but given little weight.

6. The Appeals Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

AWARD

WHEREFORE, the Appeals Board modifies the April 20, 2000 Award as set forth above.

Nettie Wilson is granted compensation from Lawrence Landscape, Inc., and its insurance carrier for a November 10, 1997 accident and resulting disability. Based upon an average weekly wage of $542.08, Ms. Wilson is entitled to receive 46 weeks of temporary total disability benefits at $351 per week, or $16,146. Thereafter, 52 weeks of benefits are due at $351 per week, or $18,252, for a 70 percent permanent partial general disability for the period from September 28, 1998, through September 27, 1999. Thereafter, 109.28 weeks of benefits are due at $351 per week, or $38,357.28, for a 42 percent permanent partial general disability for the period commencing September 28, 1999. The total award is $72,755.28.

As of October 10, 2000, there is due and owing to the claimant 46 weeks of temporary total disability compensation at $351 per week in the sum of $16,146, plus 106.14 weeks of permanent partial general disability compensation at $351 per week in the sum of $37,255.14, for a total due and owing of $53,401.14, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $19,354.14 shall be paid at $351 per week until paid or further order of the Director.

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[8] See K.S.A. 65-2869.

The Appeals Board adopts the orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of October 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Lawrence, KS
John F. Carpinelli, Topeka, KS
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director